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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ANAYA CASTRO, Defendant and Appellant.	D075143 (Super. Ct. No. INF1100323)

APPEAL from a judgment of the Superior Court of Riverside County, Anthony R. Villalobos, Judge. Affirmed.

Suzanne G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel J. Hilton, Lynne G. McGinnis and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

Daniel Anaya Castro beat his mother to death after she told him to get out of bed, go to work, and move out of her house. A jury convicted Castro of second degree murder

as a lesser included offense of first degree murder (Pen. Code,[1] § 187, subd. (a)). The court sentenced Castro to prison for 15 years to life.

Castro contends that the trial court erred in admitting his confession into evidence because officers failed to clarify his equivocal assertion of his right to remain silent before asking him substantive questions. We reject this argument because although officers may seek clarification of an ambiguous or equivocal assertion of *Miranda*[2] rights, they are not required to do so. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1087 (*McCurdy*).)

Castro also contends his case should be remanded to allow the superior court to consider granting him mental health diversion under section 1001.36. He asserts that section 1001.36 as originally enacted applies retroactively, but the subsequent amendment eliminating eligibility for certain defendants (like Castro, who are charged with murder) cannot apply retroactively due to the ex post facto clauses of the state and federal Constitutions. This court recently rejected an identical argument in *People v. Cawkwell* (2019) 34 Cal.App.5th 1048 (*Cawkwell*), which we follow in similarly rejecting Castro's claim.

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1 Undesignated statutory references are to the Penal Code.

2 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's Case*

In January 2011 Castro worked for a mobile car wash business. At about 7 a.m. on January 31, 2011, Alfonso V. arrived at Castro's home to drive him to work.[3] Castro's mother, Ofelia, answered the doorbell and appeared to be fine. About 10 minutes later, Alfonso heard yelling from inside the house. Castro, who was breathing hard and seemed nervous, got in Alfonso's car and they went to work.

Meanwhile, at about 7:30 a.m., Castro's sister arrived at the house and called police because she could not find Ofelia. Police found Ofelia in a bedroom closet, with a large hole in the drywall behind her head. She had only a faint pulse. Other than Castro's five-year-old niece, no one else was there.

Ofelia suffered brain hemorrhages consistent with someone striking her head with significant force and numerous contusions and abrasions.

Police interrogated Castro later that afternoon. The questioning was recorded, and the jury watched and listened to the interrogation.[4]

Initially after police Mirandized Castro, he denied striking Ofelia. Castro claimed that a burglar was responsible and insisted, "I couldn't possibly hurt my own mother." After police repeatedly told Castro to "stop lying," he said, "I'll be out by tonight."

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[3] Castro's trial was delayed until 2016 because the court twice found Castro incompetent to stand trial.

[4] The prosecutor redacted periods when Castro was alone and when police seized his clothes. Defense counsel did not object to these omissions.

Later, however, after police seized his clothes for forensic tests and left Castro alone, Castro confessed. He told police that when his mother told him three times to get up and go to work, he became angry and punched a hole in a wall near his bed. When Ofelia saw the hole, she told Castro to move out of the house. Castro responded by hitting Ophelia in the face, and then twice more in the head. After Ofelia called Castro an "idiot," he hit her several more times. Ofelia fell face-first in a closet, making a hole in the drywall. Castro hit her with his elbow and kicked her twice in the face. Ofelia died the next day from these blunt force injuries.

B. *Defense Case*

A defense-retained psychologist testified that Castro has schizophrenia and borderline intellectual functioning. She testified that these conditions impact coping skills and that Castro has "low impulse control." The psychologist testified that Ofelia's threat to kick him out of the house could trigger a fight or flight impulse.

However, on cross-examination the psychologist conceded that Castro was not psychotic when he killed Ofelia. Based on Castro's conduct during the police interrogation, the psychologist conceded that Castro appeared to be "fairly normal."

I. *NO MIRANDA VIOLATION*

A. *Additional Background*

Before trial, defense counsel sought to exclude Castro's confession. The court watched and listened to the recorded interrogation. After about 15 minutes of background questions, police Mirandized Castro as follows, as reflected in the transcript given to the jury:

"[Police]: . . . The rea—reason why we're here, man, is 'cause we're ah looking into something that occurred this morning, you know.

"Ah, but before we get to that, you know, we always know that there's always two sides to a story, you know what I mean. Ah, but you know, we—that's why we're here. We want to give you the opportunity to hear your side of the story.

"[Castro]: Uh huh.

"[Police]: But before, ah, we say something to you, or we keep asking you something (unintelligible). [¶] You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him or her represent you. Or present with you while you are being questioned. If you cannot afford to hire one, or to hire a lawyer, one will be appointed to represent you before any questioning if you wish one. Do you understand each of these rights I have explained to you?

"[Castro]: Yeah. Yes.

"[Police]: *You wanna tell us your side of the story, man*?

"[Castro]: *Oh, I—I don't*—[5]

"[Police]: Well, well, I'll explain to you, you know, I'll explain to you about what happened, but ah, ah we got a call this morning regarding ah, your mom being sick, man.

"[Castro]: My mother?

"[Police]: Yeah.

"[Castro]: Sick?

"[Police]: Yeah.

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5 As explained *post*, later the court determined that the transcript was incorrect—Castro actually said, "Oh, well, I don't know."

> "[Castro]: Okay. I seen her—I seen her in the morning before I was waking up, when I was waking up." (Italics added.)

The attorneys disagreed about what Castro said in response to the officer's invitation to tell his side of the story. Defense counsel asserted that the officer cut Castro off in the middle of his response and as a result, "We don't know what he is asking for . . . ." The prosecutor asserted that the transcript was wrong—Castro did not say, "Oh, I don't." Rather, "It is as though he is going to start making another statement, and then the officer kind of clarifies again."

The court replayed the video. The prosecutor stated the transcript was not "completely accurate" and it sounds like Castro said, "'Well, I didn't,'" and then the officer interrupts and talks over Castro. Defense counsel disagreed, asserting that Castro said, "Me, me, no, I don't."

After replaying the video again, the prosecutor claimed that Castro said, "Well, I," and then got cut off. Defense counsel disagreed, stating "it does sound like he is saying 'No.'" The court remarked that it "sounds like he says, 'Oh, I don't,' but it does sound like he is trying to finish an answer."

Citing *United States. v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072 (*Rodriguez*), defense counsel asserted that Castro's response was ambiguous—and because the officers did not clarify whether Castro was invoking his right to remain silent before asking substantive questions, the confession should be suppressed.

After the attorneys filed additional briefs, the court stated, "I heard him say, 'I don't. Huh, I don't,'" and "the problem we have is that the officer cut him off." The court deferred ruling to listen to the recording again.

Meanwhile, the prosecutor obtained a clearer audio recording of the interrogation from the officer's hand-held recorder. After listening to this recording "30 [or] 40 times," the court determined that when the officer asked, "You want to tell us your side of the story," Castro responded, "*Oh, well, I don't know*." The prosecutor heard the same thing. Castro's attorney, however, heard, "'Well, I—I don't,' and "the 'don't' was elongated."

Having determined that Castro's "I don't know" was an equivocal assertion of *Miranda* rights, the court rejected defense counsel's argument that officers were required to clarify Castro's intent before asking him substantive questions. Additionally, the court determined that Castro was "cooperative," "kept talking," and asked questions during the interrogation. Further, the interrogation lasted hours and Castro had "multiple opportunities to invoke the right [to remain silent] before giving any further answers or admissions." Accordingly, the court denied Castro's motion to suppress.

B. *Analysis*

Broadly speaking, a person might invoke *Miranda* rights at two different times during a custodial interrogation. The first is after police initially give a *Miranda* warning. The second is after an initial waiver of *Miranda* rights, when during an interrogation the person invokes the right to remain silent or to consult with an attorney. Some courts refer to the former as a "prewaiver" case and the latter as "postwaiver." (E.g., *People v. Duff* (2014) 58 Cal.4th 527, 553 (*Duff*); *Rodriguez, supra*, 518 F.3d at p. 1080.)

Citing *Duff*, *supra*, 58 Cal.4th 527 and *Rodriguez*, *supra*, 518 F.3d 1072, Castro contends that police were required to clarify whether he was invoking his right to remain silent before proceeding with the interrogation. He concedes that police are not required to clarify a postwaiver equivocal invocation of *Miranda* rights. However, Castro contends that police must seek to clarify an initial (i.e., prewaiver) equivocal invocation of *Miranda* rights before asking substantive questions. He asserts the trial court erred by applying postwaiver law (no duty to clarify) to this prewaiver case.

"'In reviewing *Miranda* issues on appeal, we accept the trial court's resolution of disputed facts and inferences as well as its evaluations of credibility if substantially supported, but independently determine from undisputed facts and facts found by the trial court whether the challenged statement was legally obtained.'" (*People v. Martinez* (2010) 47 Cal.4th 911, 949.) Ordinarily, where "an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review." (*Duff*, *supra*, 58 Cal.4th at p. 551.) Here, however, even though the interrogation was recorded, Castro's statement is disputed. Defense counsel stated she heard Castro say, "'Well, I—I don't,' and "the 'don't' was elongated." But the trial court and the prosecutor heard, "Oh, well, I don't know." Factfinding in this context is best left to the trial court. Accordingly, we defer to the trial court's determination that Castro said, "Oh, well, I don't know."[6]

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6 In any event, we have listened to both audio recordings of this portion of the interrogation and we cannot state that the trial court erred in concluding that Castro said, "Oh, well, I don't know."

"Under *Miranda*, police officers must warn a suspect before questioning that he or she has the right to remain silent and the right to the presence of an attorney." (*People v. Case* (2018) 5 Cal.5th 1, 20 (*Case*).) When a suspect makes an unambiguous invocation of *Miranda* rights, all questioning must immediately cease. (*Smith v. Illinois* (1984) 469 U.S. 91, 98.)

A suspect's invocation of the right to remain silent or to counsel at the beginning of questioning must be unambiguous. (*Case*, *supra*, 5 Cal.5th at p. 20 [right to remain silent]; *McCurdy*, *supra*, 59 Cal.4th at p. 1087 [right to counsel].) We evaluate the invocation of *Miranda* rights from the point of view of a reasonable police officer in the circumstances. (*Case*, *supra*, 5 Cal.5th at p. 20.) "Although officers may seek clarification of an ambiguous request, they are not required to do so." (*McCurdy*, *supra*, 59 Cal.4th at p. 1087.) Castro's "I don't know" response to the officer's question ("Do you want to tell us your side of the story") is perhaps the epitome of an equivocal response. Under *McCurdy* and *Case*, although police could seek to clarify Castro's intention before asking substantive questions, they were not required to do so.

Disagreeing with this result and citing *Duff*, *supra*, 58 Cal.4th 527 and *Rodriguez*, *supra*, 518 F.3d 1072, Castro contends that officers were required to clarify whether he was invoking his right to remain silent. In *Rodriguez*, the suspect responded to the officer's *Miranda* advisement by stating, "'I'm good for tonight.'" (*Rodriguez*, at p. 1075.) Finding this statement to be ambiguous, the Ninth Circuit held that prior to obtaining a *Miranda* waiver, officers must clarify an ambiguous or equivocal response to the *Miranda* warning before proceeding with the interrogation. (*Rodriguez*, at pp. 1074,

1077.) However, we are not bound by Ninth Circuit decisions, even on federal questions. (*People v. Brooks* (2017) 3 Cal.5th 1, 90; *People v. McCoy* (2005) 133 Cal.App.4th 974, 982.)

Castro's reliance on *Duff, supra*, 58 Cal.4th 527 is also not dispositive of the issue. There, after detectives asked the defendant if he wanted to talk, he said, "'I don't know. Sometimes they say it's—it's better if I have a—a lawyer.'" (*Id.* at p. 552.) The *Duff* court stated, "In the face of an initial equivocal reference to counsel, we have held that an officer is permitted to clarify the suspect's intentions and desire to waive his or her *Miranda* rights. [Citation.] The Ninth Circuit has explicitly declared that an officer not only may, but *must*, clarify the suspect's intentions before initiating substantive questioning. (*Rodriguez*], *supra*, 518 F.3d 1080 . . . ; but cf. *Berghuis v. Thompkins* [(2010)] 560 U.S. [370], 387 [rejecting the argument that a clear waiver must always precede questioning . . . .].) We have occasionally implied the same rule as the Ninth Circuit's. [Citation.] [¶] Even so, no *Miranda* violation occurred here" (*Duff*, at pp. 553-554) because assuming that police must clarify an equivocal invocation of *Miranda* rights before further questioning, the officer did so. (*Id.* at p. 554.)

Thus, contrary to Castro's contention, the court in *Duff* did not hold that police must clarify an equivocal invocation of *Miranda* rights in a prewaiver case. Rather, assuming but not deciding that such a duty existed, the *Duff* court held that the officer in that case complied.

Six months after deciding *Duff*, the California Supreme Court addressed the same issue in a prewaiver case. In *McCurdy, supra*, 59 Cal.4th 1063—a case Castro does not

mention in his opening brief—after being Mirandized the defendant responded, '"They always tell you get a lawyer . . . I don't know why.'" (*Id.* at p. 1081.) On appeal, the defendant asserted he invoked his right to counsel and, therefore, his statements thereafter were inadmissible. (*Id.* at p. 1087.) Rejecting that claim and citing *Davis v. United States* (1994) 512 U.S. 452 (*Davis*), the California Supreme Court stated, "A suspect's invocation of the right to counsel must be unambiguous. . . . Although officers may seek clarification of an ambiguous request, they are not required to do so." (*McCurdy*, at p. 1087.)

The *McCurdy* court's reliance on *Davis*, *supra*, 512 U.S. 452 is significant because *Davis* is a postwaiver case. (*Davis*, at p. 461.) The *Davis* court held that in a postwaiver case, police have no obligation to ask clarifying questions and may continue questioning the suspect. (*Id.* at pp. 461-462.) *Davis* did not address whether the same standard applied to requests for counsel made *before* such rights were waived—i.e., in a prewaiver case, such as Castro's. However, 16 years after *Davis*, in *Berghuis*, *supra*, 560 U.S. 370, the United States Supreme Court applied the *Davis* standard in a prewaiver context involving the right to remain silent. (*Berghuis*, at p. 381 (dis. opn. of Sotomayor, J.).) Although the majority opinion in *Berghuis* did not acknowledge this extension of *Davis* to a prewaiver case involving the right to remain silent, the dissenting opinion did. (*Berghuis* at p. 407 (dis. opn. of Sotomayor, J.).) Commentators and other courts view the majority opinion in *Berghuis* as standing for the proposition that the *Davis* standard applies in both prewaiver and postwaiver contexts. (See 2 LaFave, Criminal Procedure (4th ed. 2015) § 6.9(g), p. 972, fn. 217 ["Thus, it is now clear that *Davis* also applies

where 'a court evaluates an initial rather than subsequent invocation.'"]; *State v. Climer* (Tenn. 2013) 400 S.W.3d 537, 561 [noting that since *Berghuis*, "a number of the decisions . . . limiting *Davis* to the post-waiver context have been overruled, and *Davis* has been applied in those jurisdictions in the pre-waiver context"].)

McCurdy, *supra*, 59 Cal.4th 1063 involved the right to counsel rather than the right to remain silent, as is involved here. However, "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel . . . ." (*Berghuis, supra*, 560 U.S. at p. 381.) Accordingly, *McCurdy*, a prewaiver case, compels the conclusion that before proceeding with Castro's interrogation, police were permitted—but not required—to ask questions designed to clarify his equivocal assertion of the right to remain silent.[7]

This conclusion finds additional support in *Case*, *supra*, 5 Cal.5th 1. There, after police advised a homicide suspect of his *Miranda* rights at the *start* of the interrogation (i.e., a prewaiver case), the defendant claimed he invoked his right to remain silent about the crimes they were investigating. (*Id.* at p. 21.) The California Supreme Court stated, "'If an accused makes a statement . . . "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, [citation], or ask questions

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7 In his reply brief, Castro contends *McCurdy*, *supra*, 59 Cal.4th 1063 is materially distinguishable. We disagree because like Castro's case, *McCurdy* involves an equivocal prewaiver invocation of a *Miranda* right. Castro also argues that a distinction between pre and postwaiver cases still exists because *McCurdy* did not overrule *Duff*, *supra*, 58 Cal.4th 527. We reject this argument because *McCurdy* and *Duff* are not inconsistent. As noted *ante*, the court in *Duff* did not decide whether police must clarify an ambiguous prewaiver invocation of *Miranda* rights before substantive questioning.

to clarify whether the accused wants to invoke his or her *Miranda* rights [citation].'" (*Case*, at p. 20.)

We also reject Castro's contention that there are "compelling" reasons to treat prewaiver and postwaiver invocations differently. The United States Supreme Court has rejected such an argument, stating, "There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity. [Citation.] If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.' [Citation.] Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. [Citations.] Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights 'might add marginally to *Miranda* 's goal of dispelling the compulsion inherent in custodial interrogation.' [Citation.] But 'as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.'" (*Berghuis*, *supra*, 560 U.S. at pp. 381-382.)

Castro also contends his case is "somewhat unique" because his statement was equivocal not only because of its "content," but also because "the recording itself was unclear." Castro contends that "[i]t is quite possible that [he] did in fact unequivocally

say that he did not want to speak with detectives, but the police simply spoke over him an[d] drew him into substantive questioning."

The record does not support this assertion. After listening to the hand-held recording more than 30 times, the court determined that Castro never unequivocally invoked his *Miranda* rights. Indeed, with some bravado during the first hour of the interrogation, Castro insisted that he never touched his mother, was "positive" that a jury would believe him, and taunted police by predicting he would be released from custody "by tonight."

We next consider whether Castro waived his right to remain silent. Even if Castro did not invoke his right to remain silent, his statements during his custodial interrogation are inadmissible unless he "in fact knowing and voluntarily waived" his *Miranda* rights. (*Berghuis, supra,* 560 U.S. at p. 382.)

Castro contends that he "never explicitly waived his Fifth Amendment rights." However, waiver can be implied. (*Berghuis, supra,* 560 U.S. at p. 384.) "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (*Ibid.*)

In the trial court, defense counsel stipulated that officers properly Mirandized Castro. Moreover, before police asked substantive questions, Castro unambiguously stated that he understood his *Miranda* rights. Over the ensuing hours of interrogation, Castro never asked questioning to end. Accordingly, the court correctly determined that Castro impliedly waived his right to remain silent.

Castro also contends that his interrogation "must also be viewed in the context of [his] having a low IQ and possibly schizophrenia," as well as two separate determinations that he was incompetent to stand trial. These factors might bear on whether Castro's confession was voluntary; however, Castro has not raised that issue on appeal. In any event, Castro's argument fails because the defense-retained psychologist testified that Castro demonstrated good memory, no delusions, and was not confused, angry, emotional, or agitated when interrogated by police. Moreover, on cross-examination the psychologist agreed that in the final analysis she did not diagnose Castro with schizophrenia.

II. *MENTAL HEALTH DIVERSION*

After the court sentenced Castro, the Legislature established a pretrial diversion program for defendants diagnosed with qualifying mental health disorders. (*Cawkwell, supra*, 34 Cal.App.5th at p. 1050; § 1001.36, subd. (a).) A few months later, the Legislature amended the diversion scheme to eliminate eligibility for defendants, such as Castro, charged with murder. (*Cawkwell*, at p. 1050; § 1001.36, subd. (b)(2)(A).)

In supplemental briefing, Castro contends we should remand the matter to the superior court to conduct a hearing under section 1001.36. Although Castro concedes that his murder charge makes him ineligible for mental health diversion, he contends that section 1001.36, as originally enacted, applies retroactively to his case, while the subsequent amendment eliminating his eligibility cannot apply retroactively due to the ex post facto clauses of the state and federal Constitutions.

The Attorney General contends that section 1001.36 is not retroactive. Additionally, the Attorney General asserts that under the subsequent amendment to section 1001.36, Castro's murder charge renders him ineligible for diversion.

We recently considered the retroactivity of section 1001.36 in *Cawkwell, supra,* 34 Cal.App.5th 1048. There, this court held that the amendment making certain defendants ineligible for diversion does not violate the ex post facto clauses because the possibility of pretrial mental health diversion did not exist when the defendant committed the alleged offense. Consequently, the defendant could not have relied on the possibility of receiving pretrial mental health diversion when he committed the crime. (*Id.* at p. 1054.) "Moreover, the Legislature's amendment of section 1001.36 to eliminate eligibility for defendants charged with [murder] did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offenses with which [the defendant] was charged." (*Ibid*.)

The same analysis applies here. Because we reject Castro's contention that the subsequent amendment eliminating his eligibility cannot apply retroactively, we need not also determine whether section 1001.36 otherwise applies retroactively. (*Cawkwell, supra,* 34 Cal.App.5th at p. 1053.)

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.